



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Motor Vehicle Dealer License
of All Star Rent a Car, Inc., Respondent

Case Nos.: TR-02-0030 & TR-02-0044

FINAL DECISION

With respect to Case No. TR-02-0030, on July 17, 2002, the Division of Motor Vehicles of the Wisconsin Department of Transportation filed a complaint with the Division of Hearings and Appeals regarding the business practices of All Star Rent a Car, Inc. The complaint seeks an order suspending or revoking the motor vehicle dealer license of All Star Rent a Car, Inc.

With respect to Case No. TR-02-0044, All Star Rent a Car, Inc., filed an application for the renewal of its motor vehicle dealer license. By letter dated September 4, 2002, the Department of Transportation denied the application. By letter dated September 25, 2002, Attorney Richard J. Ward, on behalf of All Star Rent a Car, Inc., filed a request for hearing to review the denial.

Pursuant to due notice, a combined hearing in these two matters was conducted on November 8, 2002, in Madison, Wisconsin. Mark J. Kaiser, Administrative Law Judge, presided. The parties filed post-hearing briefs. The last brief was received on February 18, 2003.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES are certified as follows:

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The issues to be decided are:

With respect to Case No. TR-02-0030, the issues are set forth in the Department of Transportation's complaint dated July 17, 2002. The Department has the burden of proof on these issues.

With respect to Case No. TR-02-0044, the grounds for denial of the application of All Star Rent A Car, Inc., are set forth in the Department of Transportation's denial letter. The issues for hearing are whether the allegations in the denial letter are true and, if so, whether they constitute a reasonable basis for the denial of the application of All Star Rent a Car, Inc. The Department has the burden to prove the allegations are true. All Star Rent a Car, Inc. has the burden to prove that the allegations do not constitute a reasonable basis for the denial of its application for renewal of its motor vehicle dealer license.

The ALJ issued a proposed decision on March 31, 2003. The Proposed Decision found two of the three violations alleged by the Wisconsin Department of Transportation (Department). The Proposed order revoked the motor vehicle dealer license of All Star Rent a Car, Inc., (All Star) and affirmed the Department's denial of All Star's application for renewal of its license. The Department and All Star both filed comments on the Proposed Decision on April 14, 2003.

The Department objects to the conclusion that All Star's failure to promptly return Terry Fillenworth's payment to him does not constitute a violation Wis. Admin. Code § Trans 139.05(3). As discussed in the Proposed Decision, Wis. Admin. Code § Trans 139.05(3) applies to a situation in which a dealer does not accept a prospective purchaser's offer to purchase a vehicle. In this case, Mr. Fillenworth rescinded the offer to purchase. All Star's failure to return Mr. Fillenworth's payment promptly is not a violation of Wis. Admin. Code § Trans 139.05(3).

All Star objects to the findings that it failed to disclose the existence of significant frame damage to the Gradys in violation of Wis. Admin. Code § Trans 139.04 and that Eugene Rondon failed to allow a Department investigator to inspect records in violation of Wis. Stat. § 218.0116(5). Alternatively, All Star argues that even if the violations are found, they do not justify the revocation of All Star's motor vehicle dealer license and/or the denial of its application for renewal of its license.

With respect to the Grady complaint, the record contains sufficient, credible evidence that the vehicle purchased by the Gradys had frame damage at the time it was purchased by the Gradys. The vehicle sustained frame damage in an accident prior to the time it was acquired by All Star, there is no documentation that the frame damage was repaired, and the existence of frame damage was discovered shortly after the Gradys purchased the vehicle. The record also supports a finding that the damage is significant.¹

¹ All Star points out that the invoice from Countryside Ford-Mercury states that the mechanic noticed damage to the "lower left hand side of fram[e] cross member" (Proposed Finding of Fact no. 9) and in the "Discussion" section of

All Star argues that in the context of the entire statute, Wis. Stat. § 218.0116(1)(gm) should be interpreted as requiring a “willful failure” to constitute grounds for revocation. All Star cites no authority for this proposition. However, even if one did accept this argument, the term “willful” as used in this statute “is to be liberally understood to include both non-accidental and fraudulent acts.” *Dept. of Transp. v. Transp. Comm.*, 105 Wis. 2d 678, at 685, 315 N.W.2d 371 (Ct. of App. 1981). The finding is that the frame damage should have been discovered if a reasonable pre-sale inspection of the vehicle had been performed. All Star either failed to perform a reasonable pre-sale inspection of the vehicle, or if it did, failed to disclose the frame damage to the Gradys. All Star’s conduct would be considered “willful” under the definition set forth in *Dept. of Transp. v. Transp. Comm.* Either of these scenarios constitutes a violation of Wis. Admin. Code § Trans 139.04(5), and, in turn, a violation of Wis. Stat. § 218.0116(1)(gm).

All Star also argues that the evidence in the record does not support finding that it violated Wis. Stat. § 218.0116(5). Although the parties dispute the demeanor of Eugene Rondon and James Harden, Jr. at the time Harden visited the dealership facilities on July 8, 2002, the fact that Mr. Rondon refused to produce the requested records is undisputed. All Star now alleges that the statute does not require a licensee to produce records on demand; however, shortly after the incident, Mr. Rondon apologized for his refusal to do so (exh. 10). Mr. Rondon’s apology demonstrates that he did understand his obligations under Wis. Stat. § 218.0116(5). The evidence in the record supports a finding of a violation of Wis. Stat. § 218.0116(5).

All Star argues that even if the violations are found, these violations do not justify the revocation of All Stars motor vehicle license. All Star cites the Department’s “Disciplinary Action Policy” (exh. 42) as support for this contention. According to All Star, “[t]he DOT’s own policy states that denial, revocation or suspension will be imposed as a sanction only for odometer (fraud) tampering, giving false odometer statement to purchaser with intent to defraud, and felony convictions for bank fraud, money laundering, stolen vehicles and auto part theft.” The “Disciplinary Action Policy” is not a promulgated administrative regulation. It is a policy statement intended to guide field investigators and consumer specialists regarding actions they can take without supervisory authority. (See: “Scope of the Policy” p. 1 of the “Disciplinary Action Policy”) The ultimate standard for revocation, suspension, or denial of motor vehicle dealer licenses is Wis. Stat. § 218.0116(1). Nevertheless, the Department’s actions in this matter are consistent with the provisions of the “Disciplinary Action Policy.”

Although the “Disciplinary Action Policy” only lists three examples under the heading “Denial, Revocation, Supervision,” nothing in the document limits the Department’s discretion to undertake these disciplinary actions to these three examples. The three violations listed are only intended as examples of the type of violations that would warrant a suspension, revocation or denial of a license. In a cover document introducing the “Disciplinary Action Policy” (page 1

the Proposed decision, the ALJ states the vehicle “has damage to the right side of a front cross member.” All Star alleges this discrepancy is “fatal.” The fact that the vehicle has frame damage is undeniable. The fact that the mechanic at Countryside Ford-Mercury mistakenly described the damage as on the left side, rather than the right, does not undermine the finding that the vehicle has frame damage.

of exhibit 42), drafters of the policy state “[e]xamples are provided showing the kinds of violations and other associated conditions that may result in specific disciplinary action.”

Additionally, the page listing examples of the types of violations that would warrant the denial, suspension, or revocation of a motor vehicle dealer license also lists the following “Additional Considerations for Administrative Action:”

Has the dealer admitted guilt and is willing to take corrective action?

Has the dealer made a reasonable restitution offer?

Number of violations within last 5 years.

Past track record, time since last major violation, warning letters, advisory letters, inspection reports, number and type of past complaints.

Extent of consumer harm.

Does a suspension or revocation serve a useful purpose now?

It should also be noted that the “Disciplinary Action Policy” does provide on page 4:

In every instance where there is a serious allegation against a licensee, or where the licensee has refused the division’s recommended mediated settlement of restitution to a customer injured by an alleged violation, the division will reserve the right to initiate action to suspend, revoke or deny a license. Once satisfied that an allegation can be proved, action may be taken that could ultimately result in a formal hearing before OCT for the purpose of suspending or revoking a dealer’s license.

As discussed in the Proposed Decision, although All Star’s refusal to accept the Department’s recommended settlement of the Grady complaint is not an element of the violation, it is one of the reasons that the Department decided to pursue an enforcement action. This decision is consistent with the “Disciplinary Action Policy.”

Another fact that the Department considers in deciding whether to pursue an action against a dealer’s license is the dealer’s past track record. The Division of Hearings and Appeals issued a Special Order against National Vehicle Management, Inc., another dealership operated by Eugene Rondon. The Special Order contained the following requirements:

1. Respondent shall conduct reasonably diligent inspections as required under Wis. Admin. Code sec. Trans 139.04(4) and (5) by a technician who may knowledgeably inspect the condition of a vehicle which shall include a walk around and interior inspection, an under the vehicle inspection which allows complete access to the underbody of the vehicle, an under the hood inspection and a test drive. An inspection shall include a review

of all records regarding a vehicle including, but not limited to, repair records, title history and prior owner records which are received by respondent in the ordinary course of business or otherwise known to respondent.

2. In the event an inspection reveals that a supportive portion of a frame or unibody was damaged and/or repaired, respondent shall perform a more thorough inspection to ascertain the extent of the damage and/or repair. Information indicating a likelihood of damage shall include, but is not limited to, notations on repair or purchase invoices or titles that a vehicle was frame damaged or salvaged or repairs were performed to a unibody or the appearance of clamp or other marks on a unibody indicating the vehicle had been stretched. The supportive portion of a unibody shall be determined based on manufacturer specifications for the motor vehicle in question.

In light of the existence of these requirements, All Star's violation of Wis. Admin. Code § Trans 139.04(5) is an especially serious violation warranting revocation and/or denial of its motor vehicle dealer license and the Department's decision to pursue a licensing action is consistent with the additional considerations stated in the "Disciplinary Action Plan." For the reasons set forth above, the objections to the Proposed Decision are not persuasive. The Proposed Decision is adopted as the Final Decision in this matter.

Findings of Fact

The Administrator finds:

1. All Star Rent a Car, Inc. (All Star or the Dealer), is a motor vehicle dealer conducting business at 1440 Martin Street, Madison, Wisconsin. All Star Rent a Car, Inc., holds a motor vehicle dealer license issued by the Department of Transportation (the Department).
2. Eugene Rondon and his wife, Sue Rondon, are the sole shareholders in All Star. Eugene Rondon is the general manager of All Star.
3. On July 17, 2002, the Department filed a complaint pursuant to Wis. Stat. § 218.0116(4) with the Division of Hearings and Appeals. The complaint alleges that the Dealer violated various provisions of the Wisconsin statutes and Wisconsin Administrative Code regulating the conduct of motor vehicle dealers.² Based on the alleged violations, the Department is seeking the suspension or revocation of the Dealer's motor vehicle dealer license.

² The incidents that form the basis for the alleged violations are the same as the grounds that form the basis for the Department's subsequent denial of the Dealer's application for the renewal of its motor vehicle dealer license. The incidents and alleged violations are set forth in paragraph four.

4. The motor vehicle dealer license of All Star expired on September 30, 2002. On August 30, 2002, All Star applied for a renewal of its license. By letter dated September 4, 2002, the Department denied the application. The grounds for the denial are set forth in the letter and are as follows:

- You sold a 1997 Ford Explorer, vin 1FMDU34EVUD07901, to David and Michelle Grady on February 17, 2001, with undisclosed, significant existing frame damage, in violation of Wis. Stats. Section 218.0116(1)(gm) and Wis. Admin. Code Trans 139.04 and Trans 305.23.
- On or about March 11, 2002, you accepted from Terry Fillenworth a deposit in the amount of \$2,535 for a 1992 Mercury Sable, 1MECMM5547NG11246. On or about March 14, 2002, Terry Fillenworth learned that the vehicle had substantially more mileage than you had advertised and did not accept delivery of the vehicle. Terry Fillenworth requested a refund of the down payment on or about March 15, 2002. You sold the vehicle to Sergio Ramirez on March 26, 2002, and have not refunded Terry Fillenworth his down payment of \$2,535.00, in violation of Wis. Stats. Section 218.0116(1)(gm), and Wis. Admin. Code Trans 139.05(3).
- On July 8, 2002, Investigator James Harden requested your business records relevant to a complaint filed by Lyn Haak. You refused Investigator Harden's request for records, in violation of Wis. Stats. Section 218.0116(5).

Grady Complaint

5. David and Michelle Grady (the Gradys) purchased a 1997 Ford Explorer, vehicle identification number 1FMDU34E3VUD07901, from the Dealer. The Dealer had acquired the vehicle from Copart, an auto auction in Madison. The vehicle had previously been owned and used by the Marquette County Sheriffs Department. While in use by the Marquette County Sheriffs Department, the vehicle was involved in an accident and still had front end damage at the time it was purchased by the Gradys (testimony of Eugene Rondon).

6. The Gradys and the Dealer executed a purchase contract for the purchase of the vehicle on January 31, 2001 (exh. 20). On the face of the purchase contract the Dealer placed the following stamped notice under a section of the purchase contract titled "Other Conditions of Sale:"

Sold as a repairable vehicle
Buyer assumes
all risks and repairs.

In another part of the contract, the Dealer placed the following handwritten disclosure:

Previous owner
Marquette County
Sheriffs Dept
The vehicle may
have been used for
police use.

7. The Gradys agreed to accept delivery of the vehicle on February 17, 2001. The Wisconsin Buyers Guide prepared for the vehicle indicates that the pre-sale inspection of the vehicle was conducted February 17, 2001 (exh. 20). The Gradys signed and were given a copy of the Wisconsin Buyers Guide on February 17, 2001.

8. Under the "Used Vehicle General Condition" section of the Wisconsin Buyers Guide, the Dealer marked the box indicating that there were no "Corrective welds or other evidence of repair to strut tower, floor pan, frame or structural portion of unibody." In the "Vehicle Equipment Requirements" section of the Wisconsin Buyers Guide the Dealer checked that the "Frame or Structural Portion of Unibody" was legal. The Dealer did not disclose anywhere on the Wisconsin Buyers Guide the existence of frame damage on the vehicle.

9. On March 1, 2001, the Gradys took the vehicle to a Ford dealer for service. In the course of working on the vehicle, a mechanic noticed that there was damage to the lower left-hand side of the frame cross member and right front axle shaft, and right front wheel (exh. 20). This damage existed on the vehicle at the time the Gradys purchased it from the Dealer. The basis for this finding is set forth in the "Discussion" section below.

10. The Gradys contacted the Dealer about the frame damage. Mr. Rondon initially agreed to repair the frame damage. However, after obtaining estimates for repairing the frame damage, the Gradys decided they no longer wanted to keep the vehicle and requested that the Dealer buy back the vehicle rather than pay to have it repaired. Settlement negotiations between the Gradys and the Dealer were ultimately unsuccessful and on December 13, 2001, the Gradys filed a complaint against the Dealer with the Department (exh. 20).

11. In the course of the investigation of the complaint, Department investigators discovered that the vehicle had been involved in an accident while in use by the Marquette County Sheriffs Department and that the vehicle had sustained frame damage (exh. 47). Additional inspections of the vehicle were performed as a part of the Department's investigation of the Gradys' complaint and in anticipation of the hearing. These investigations confirmed the existence of the frame damage.

One inspection was performed at Kayser Ford in Madison. In a letter dated February 5, 2002, the service technician stated that the “front sub frame [was] damaged in a way that the sub frame looked liked an accordion. It appear[ed] that the structural integrity of the vehicle would be compromised in this current condition.” (exh. 22) Another inspection was performed at Ideal Body Shop in Madison. In a statement dated February 19, 2002, the person who performed the inspection reported that the “Ford Explorer was a total loss. The front crossmember is heavily damaged. It affects the structure of the vehicle. The right lower control arm (A-frame) should also be replaced. The tires are wearing badly in the inside. The frame affects the entire car. Do not recommend to continue driving.” (exh. 23)

12. All Star also presented expert testimony regarding the frame damage. All Star’s expert, Gregory C. Anderson, testified that he observed damage to the right side of the cross member, a component of the frame of the vehicle, and the A-arm. Mr. Anderson did not have an opinion as to whether the vehicle is safe to drive with the unrepaired frame damage. As part of his investigation, Mr. Anderson also took photographs of the frame damage (exh. 53). The photographs show that the frame damage is readily visible.

13. Pursuant to Wis. Admin. Code § Trans 139.04(4), motor vehicle dealers are required to disclose in writing to prospective purchasers the existence of significant existing damage to the frame or structural portion of the unibody of used vehicles offered for sale. The Dealer should have discovered the frame damage during its pre-sale inspection of the vehicle. The Dealer did not disclose the existence of frame damage on the vehicle to the Gradys on the Wisconsin Buyers Guide or in any other manner. Although the frame damage is significant, the record does not contain sufficient evidence to find that frame damage renders the vehicle unlawful to operate pursuant to Wis. Admin. Code § 305.23.

Fillenworth Complaint

14. All Star offered for sale, through an internet auction on e-bay, a 1992 Mercury Sable, vehicle identification number 1MECM5547NG611246. Terry Fillenworth of Cedar Rapids, Iowa was the high bidder on the vehicle. On March 11, 2002, the Dealer telephoned Mr. Fillenworth and informed him that he was the high bidder for the vehicle. Mr. Fillenworth wired \$2,535.00 to All Star’s account in payment for the vehicle. After sending the payment to All Star, Mr. Fillenworth rescinded the deal because of an inconsistent odometer statement and demanded that All Star return his money.

15. All Star never sent Mr. Fillenworth a written purchase contract for the vehicle. The purchase contract prepared by All Star was incomplete and did not include Mr. Fillenworth’s name, did not include a date, and was not signed by Mr. Fillenworth or a representative of All Star. Mr. Fillenworth never accepted delivery of the Mercury Sable from All Star and All Star never delivered the Mercury Sable to Mr. Fillenworth.

All Star eventually sold this vehicle to another customer (Sergio Romero Ramirez) on March 26, 2002.

16. All Star did not return any of the \$2,535.00 paid by Mr. Fillenworth for the 1992 Mercury Sable until July 24, 2002. On July 24, 2002, the Dealer returned a portion of Mr. Fillenworth's payment to him. It is unclear when All Star refunded the balance of his payment to Mr. Fillenworth; however, presumably the balance was refunded sometime around October 2, 2002, the date Mr. Fillenworth signed a release.

17. The length of time it took the Dealer to refund Mr. Fillenworth's payment to him after he rescinded the transaction is a concern. However, the Dealer testified that he offered to return the Mr. Fillenworth's payment to him as soon as he executed a release of liability. In support for this allegation, the Dealer offered as an exhibit a series of correspondence between its attorney and Mr. Fillenworth's attorney related to the refund of his payment (exh. 35).

18. Mr. Fillenworth did not testify at the hearing, accordingly, the Dealer's testimony on this issue is undisputed. The transaction was not a face-to-face transaction. The Dealer began to complete a purchase contract for the transaction; however, Mr. Fillenworth rescinded the transaction prior to the completion of the purchase contract. According to the Dealer's testimony, Mr. Fillenworth's payment was refunded to him after he executed a release of liability. Based on this evidence, the Dealer's conduct with respect to this transaction does not appear to constitute a violation of any statute or administrative regulation regulating motor vehicle dealers.

Failure to comply with request for records.

19. On July 8, 2002, Department investigator James L. Harden, Jr., visited Mr. Rondon at All Star's business premises. Mr. Harden asked to review All Star's business records relevant to a customer complaint. Mr. Rondon knew that Mr. Harden was an investigator from the Department. Mr. Rondon refused to produce the requested records other than a release executed by the customer who filed the complaint. Mr. Rondon informed Mr. Harden that requests for records should be directed to the Dealer's attorney.

20. Pursuant to Wis. Stat. § 218.0116(5), licensed motor vehicle dealers are required to allow the Department to "inspect the pertinent books, records, letters and contracts of licensed dealers." Mr. Rondon has been in the motor vehicle business for forty years. His testimony that he did not know that he was required to produce records requested by the Department's investigator is not credible. The Dealers refusal to produce the requested records for Mr. Harden constitutes a violation of Wis. Stat. § 218.0116(5).

21. Eugene Rondon was previously the president of National Vehicle Management, Inc., a licensed used motor vehicle dealer. The motor vehicle dealer license of National Vehicle Management, Inc., was suspended for fifteen days in 1994 pursuant to a stipulation between the Department and National Vehicle Management,

Inc., and a special order issued by the Division of Hearings and Appeals (exhs. 1 and 2). In the stipulation, Mr. Rondon admitted to, among other violations, “failing to complete pre-sale inspections [and] make disclosures as required by Wis. Admin. Code sec. 139.04(4), (5), and (6).” Mr. Harden testified that he is not aware that the Department has received any consumer complaints filed against Mr. Rondon or any dealerships he managed since 1995 until the ones that are at issue in this matter.

Applicable law

Wis. Stat. § 218.0116(5) provides:

The licensor may inspect the pertinent books, records, letters and contracts of a licensee and shall determine the cost of an examination. The cost of an examination shall be paid by the licensee so examined within 30 days after demand for the examination by the licensor. The licensor may maintain an action for the recovery of the costs of the examination in any court of competent jurisdiction.

Wis. Admin. Code §§ 139.04(4), (5) and (6) provide, in relevant part:

(4) USED MOTOR VEHICLE GENERAL CONDITION DISCLOSURE. Dealer and salespersons shall inform prospective retail purchasers of used motor vehicles in writing before purchase contract execution, in the manner and on the form prescribed in sub. (6). This disclosure shall include all significant existing mechanical, electrical and electronic defects and damage and evidence of repair to strut tower, trunk floor plan, frame or structural portion of unibody, including corrective welds. Disclosure of information shall be that which the licensee can find using reasonable care.

(5) USED MOTOR VEHICLE EQUIPMENT REQUIREMENTS AND DISCLOSURE.

(a) Dealer and salespersons shall inform prospective retail purchasers of used motor vehicles in writing before purchase contract execution, in the manner and on the form prescribed in sub. (6). This disclosure shall include whether or not the condition of a vehicle for sale is such that it can be legally operated at all times in accordance with ch. 347, Stats., and ch. Trans 305. Disclosure of information shall be that which the dealer can find using reasonable care.

(b) If a vehicle is inoperable in such a manner as to make compliance impossible to determine, or if the dealer licensee does not correct all defects which prohibit its legal operation prior to delivery of the vehicle to a retail purchaser, the dealer and salesperson licensee shall:

1. Make the following disclosure conspicuously on the face of the motor vehicle purchase contract prior to its execution:

"WARNING!

This vehicle cannot be legally operated on Wisconsin highways and may not be safe."

2. Specify for the retail purchaser the defects which are in violation of ch. 347, Stats., and ch. Trans 305 as prescribed in sub. (4) and in this subsection.

. . .

(6) WISCONSIN BUYERS GUIDE. (a) Except as provided in par. (c), each used motor vehicle displayed or offered for sale by a dealer shall display a guide as prescribed by the department. The guide shall be prepared by an authorized employee of either the dealer, another dealer having the same majority ownership as the dealer, or a predecessor dealer at the same location as the dealer. The guide shall be completed in duplicate and contain the printed names of the vehicle inspector and the records inspector. The original guide shall be signed by the dealer or a salesperson prior to separating the copy for display. The copy shall be displayed within the vehicle, attached to a window except where not possible, and shall be readable from the outside, or attached to motor driven cycles, and it shall become the possession of the purchaser upon delivery. The original shall be signed by the purchaser prior to delivery of the motor vehicle and shall be retained by the dealer for 5 years. The guide shall clearly state in simple and concise language:

1. That the vehicle is used. All material history, prior use and title brands shall be clearly and specifically disclosed, for example, rebuilt salvage, flood or water damaged, transferred to insurer upon payment of claim, manufacturer buyback, personal use, business use, lease use, rental use, demonstrator, executive, taxicab or public transportation, police vehicle, driver-education or government vehicle, or history and use unknown. All title brands that appear on the existing certificate of title for the vehicle or that will appear on the new certificate of title for the vehicle as required by s. [342.10](#), Stats., shall be disclosed. The title brand disclosures shall also include any other jurisdiction in which the vehicle has been previously titled. If the vehicle has not been previously titled in another jurisdiction, this disclosure shall specify Wisconsin. Disclosure of history and prior use is not limited to those conditions which require title branding. Required disclosure of the history, prior use and title brands is limited to that which the dealer could find using reasonable care.

. . .

Wis. Admin. Code § Trans 139.05(3) provides:

Any down payment, deposit, or title shall be returned to the prospective retail purchaser within 2 working hours from the time the offer to purchase was made if the offer to purchase is not accepted by the dealer licensee. If the prospective purchaser is not present or available during the 2 hour period, those items shall be returned in person or mailed during the following business day.

Wis. Admin. Code § Trans 305.23 provides:

- (1) The frame on every motor vehicle shall be maintained in proper condition and in conformity with this section.
- (2) Repairs, modifications or additional frame support are acceptable if they do not reduce the structural integrity or affect the alignment of the vehicle. Braze type welding may not be used on any repairs made to the frame.
- (3) The frame may not be rusted or twisted to the extent that it no longer properly supports the vehicle or no longer provides the structural integrity necessary for correct alignment or safety.
- (4) The vehicle may not be noticeably out of wheel alignment due to inadequate or improper repair or modification of the frame.
- (5) No part of the frame may be missing due to excessive rust or uncorrected damage.

Discussion

The Department has alleged three violations as grounds for both the suspension or revocation of All star's motor vehicle dealer license and for the denial of All Star's application for renewal of its license. The first step in deciding both cases is to determine whether the factual allegations underlying the respective alleged violations are true. If the facts are found to be true, the second step is to decide whether the incidents constitute violations of the administrative rules or state statutes regulating motor vehicle dealers. If the incidents are found to constitute violations, the third step, with respect to Case no. TR-02-030 (the enforcement action) is to determine whether the violations warrant suspension or revocation of All Star's motor vehicle dealer license and with respect to Case no. TR-02-044, whether the violations constitute a reasonable basis for the Department's denial of All Star's application for the renewal of its motor vehicle dealer license.

With respect to the Gradys' complaint, the Ford Explorer purchased by the Gradys unquestionably has damage to the right side of the front crossmember, a component of the vehicle's frame. All Star disputes whether this damage is significant. The testimony of the technicians that inspected the vehicle supports the Gradys' concern that the vehicle may not be safe to drive and should be repaired. The term "significant" is not defined in the Department's administrative regulations; however, frame damage that presents a legitimate safety concern must be considered significant.

All Star also disputes that the frame damage existed on the vehicle at the time it was purchased by the Gradys. The evidence in the record supports a finding that the frame damage did exist at the time the Gradys purchased the vehicle. The Department's investigators discovered that the vehicle was involved in an accident and sustained frame damage in the collision during the time it was owned and used by the Marquette County Sheriffs Department. The vehicle still had front damage at the time the Gradys executed the purchase contract for the vehicle. The scheduled date for delivery of the vehicle was seventeen days after the purchase contract was executed in order to give the Dealer time to make repairs to the vehicle.

The Dealer did not present any documentation to show that the frame damage was ever repaired. A Ford dealer discovered the frame damage two weeks after the Gradys accepted delivery of the vehicle. No evidence was presented that the vehicle was involved in a collision that could have resulted in the discovered frame damage while owned by the Gradys. Mr. Rondon testified that a pre-sale inspection of the vehicle was done; however, he could not remember who did the inspection. No one testified at the hearing that could state that he had inspected the frame of the vehicle for All Star prior to All Star's sale of the vehicle to the Gradys and that no damage existed at that time. Based on the evidence in the record, it is found that the frame damage existed at the time the Dealer sold the vehicle to the Gradys. As discussed in the Findings of Fact, the Dealer should have discovered the damage during a reasonable pre-sale inspection and disclosed the existence of the damage in writing to the Gradys.

With respect to the Fillenworth complaint, the Department alleged a violation of Wis. Admin. Code § Trans 139.05(3). This regulation requires a motor vehicle dealer to return a payment within two hours if the dealer does not accept the customer's offer to purchase a vehicle. In this case, the customer rescinded the offer to purchase the vehicle. Although the length of time the Dealer took to refund Mr. Fillenworth's payment is excessive, there does not appear to be a regulation that covers this situation. The Dealer's conduct with respect to this transaction does not appear to constitute a violation of any statutes or administrative regulation regulating motor vehicle dealers.

With respect to the incident involving Mr. Harden, as a licensed motor vehicle dealer, the Dealer is required to produce records requested by the Department. Mr. Rondon knew or should have known that he was required to produce the records for Mr. Harden. The Dealer's refusal to produce the records is a violation of Wis. Stat. § 218.0116(5).

The Department has proven two of the alleged violations. The next question is whether these two violations support a suspension or revocation of the Dealer's license (Case no. TR-02-0030) and/or the denial of the Dealer's application for the renewal of its license (Case no. TR-02-0044). The disclosure violation is serious. The seriousness of this violation is compounded by the fact that Mr. Rondon admitted to similar violations in the past. Mr. Rondon clearly is familiar with a dealer's responsibility to disclose

significant defects to prospective customers. His failure to do with respect to the vehicle sold to the Gradys warrants a substantial penalty.

All Star argues that it is being punished because it refused to accept the settlement of the Grady complaint demanded by the Department's investigators. To a certain extent this is true. The Department investigators' reports indicate that they would not have recommended pursuing the licensing actions if All Star had resolved the Grady complaint to the Gradys' satisfaction. However, even if this is true, this is not a defense to the violation. Whether, in its prosecutorial discretion, the Department would have not commenced the enforcement action or denied the Dealer's renewal application if All Star had settled the Grady complaint, is not a factor for the Division of Hearings and Appeals to consider in reviewing the reasonableness of the action taken by the Department.

The disclosure violation is a serious violation of an administrative regulation regulating the conduct of motor vehicle dealers. It is also a violation that Mr. Rondon has admitted committing in the past. Mr. Rondon knew that a reasonable pre-sale inspection included a visual inspection of the frame of the vehicle and that All Star was required to disclose the existence of the frame damage to the Gradys in writing. All Star's failure to perform a reasonable pre-sale inspection of the vehicle and/or disclose the results of the inspection to the Gradys constitutes a violation of Wis. Admin. Code §§ 139.04(4) and (6) and is a reasonable basis to revoke All Star's motor vehicle dealer license and to deny All Star's application for the renewal of its license.

The other violation, failure to produce the records requested by Mr. Harden, is also a serious violation. The Department investigators need compliance by the dealers they regulate in order to effectively regulate them. Resistance to the investigators' efforts to perform their duties renders regulation difficult or impossible. This violation also constitutes a reasonable basis to deny the Dealer's application for the renewal of its motor vehicle dealer license and is a reasonable basis for revoking All Star's motor vehicle dealer license.

Objections to Deposition Testimony

In lieu of calling Department employees Charles Supple and Kevin Konopaki as witnesses at the hearing, the parties agreed that portions of their deposition testimony could be cited in the post hearing briefs and, subject to objection, would be included in the record. Both parties did cite portions of the depositions along with their initial briefs. All Star objected to portions of the deposition testimony offered by the Department.

One of the grounds on which All Star objected to many of the Department's citations is that the testimony was not offered for clarification. The agreement to allow the parties to offer excerpts of the depositions of Mr. Supple and Mr. Konopaki was not limited to clarification. It was to allow both parties to supplement the record without having to call either of these persons as witnesses at the hearing. It was understood that the supplementary testimony offered would be on relatively minor points, but it was not

limited to clarification. Accordingly, All Star's objections to any of the deposition testimony offered by the Department on the basis that the testimony is not offered for clarification is overruled.

All Star also objects to portions of the testimony on the basis that is hearsay. Hearsay is admissible in administrative proceedings. The applicable standard for admissibility is that evidence is admissible if it is relevant and material (Wis. Stat. § 227.45). Although hearsay evidence is admissible in an administrative proceeding, it should not be received over objection where direct testimony as to the same facts is obtainable. *Outagamie County v. Brooklyn*, 18 Wis. 2d 303, at 312, 118 N.W.2d 303 (1962). All Star's objections to the portions of deposition testimony offered by the Department listed in All star's rebuttal brief dated February 14, 2003, on the basis that the testimony is hearsay are sustained.

All Star objects to other portions of the deposition testimony cited by the Department on the basis that the testimony constitutes statements of opinion or legal conclusions. The witnesses, Mr. Supple and Mr. Konopaki, may be qualified to offer opinion testimony related to the Department policies or interpretation of provisions involving motor vehicle dealer regulation. However, the excerpts cited by the Department do not provide a foundation for such testimony. Without a proper foundation such testimony is inadmissible. These objections are also sustained. The portions of the deposition testimony cited by the Department that All Star lists in its February 14, 2003 brief will not be admitted to the record.

Conclusions of Law

The Administrator concludes:

1. The failure of All Star Rent a Car, Inc., to disclose the existence of the frame damage on the vehicle purchased by the Gradys on the Wisconsin Buyers Guide prepared for that vehicle constitutes a violation of Wis. Admin. Code §§ 139.04(4) and (6).
2. The Department of Transportation has not shown that the failure of All Star Rent a Car, Inc., to promptly refund the payment made by Terry Fillenworth to him after he rescinded the offer to purchase a 1992 Mercury sable from All Star Rent a Car, Inc., constitutes a violation of any Wisconsin statute or administrative regulation regulating motor vehicle dealers.
3. The refusal of Eugene Rondon to produce records requested by Department of Transportation investigator James L. Harden, Jr., on July 8, 2002, constitutes a violation of Wis. Stat. § 218.0116(5).

4. The violations of Wis. Admin. Code §§ 139.04(4) and (6) and Wis. Stat. § 218.0116(5) constitute a reasonable basis to revoke the motor vehicle dealer license of All Star Rent a Car, Inc., pursuant to Wis. Stat. § 218.0116(4)(c).

5. The violations of Wis. Admin. Code §§ 139.04(4) and (6) and Wis. Stat. § 218.0116(5) constitute a reasonable basis to deny the application of All Star Rent a Car, Inc., for renewal of its motor vehicle dealer license pursuant to Wis. Stat. § 218.0116(2).

6. Pursuant to Wis. Stat. §§ 218.0116(4)(c), 218.0116(2), and 227.43(1)(bg), Stat., the Division of Hearings and Appeals has the authority to issue the following orders.

Order

The Administrator orders:

1. The denial by the Wisconsin Department of Transportation of the application for renewal of the motor vehicle dealer license of All Star Rent a Car, Inc., is affirmed.

2. The Department of Transportation has proven grounds that support the revocation of the motor vehicle dealer license of All Star Rent a Car, Inc. Accordingly, pursuant to Wis. Stat. § 218.0116(4) the motor vehicle dealer license of All Star Rent a Car, Inc., is hereby revoked. This order shall be effective ten days from the date of the final order in this matter.

Dated at Madison, Wisconsin on May 15, 2003.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 264-9885

By: _____
David H. Schwarz
Administrator

NOTICE

Set out below is a list of alternative methods available to persons who may wish to obtain review of the attached decision of the Division. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

2. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (1) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Any petition for judicial review shall name the Division of Hearings and Appeals as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53 to insure strict compliance with all its requirements.